IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-533

JESS H. HISQUIERDO, *Petitioner*

v.

ANGELA HISQUIERDO, *Respondent*

On Writ Of Certiorari To The Supreme Court of California

BRIEF FOR HON. PATRICIA SCHROEDER, HON. YVONNE BRATHWAITE BURKE, HON. JOHN L. BURTON, HON. CARDISS COLLINS, HON. DANTE B. FASCELL, HON. MILLICENT FENWICK, HON. DONALD M. FRASER, HON. JIM LEACH, HON. WILLIAM LEHMAN, HON. HELEN S. MEYNER, HON. BARBARA A. MIKULSKI, HON. GEORGE MILLER, HON. GLADYS SPELLMAN

MEMBERS OF CONGRESS AS AMICI CURIAE

JUDITH LICHTMAN
Women's Legal Defense Fund
1010 Vermont Ave., N.W.
Washington, D.C. 20005

MARSHA S. BERZON
177 Post St., Suite 700
San Francisco, CA 94108

STEPHANIE M. WILDMAN
University of San Francisco
School of Law
2199 Fulton Street
San Francisco, CA 94117

Attorneys for Amici Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

Subject Index

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1978
NO. 77-533

JESS H. HISQUIERDO, Petitioner,

vs.

ANGELA HISQUIERDO, Respondent

On Writ of Certiorari To The Supreme Court of California

BRIEF FOR HON. PATRICIA SCHROEDER, HON. YVONNE BRATHWAITE BURKE, HON. JOHN L. BURTON, HON. CARDISS COLLINS, HON. DANTE B. FASCELL, HON. MILLICENT FENWICK, HON. DONALD M. FRASER, HON. JIM LEACH, HON. WILLIAM LEHMAN, HON. HELEN S. MEYNER, HON. BARBARA A. MIKULSKI, HON. GEORGE MILLER, HON. GLADYS SPELLMAN

MEMBERS OF CONGRESS AS AMICI CURIAE

This brief amici curiae is filed in support of the position of respondent with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTERESTS OF AMICI CURIAE

Amici are members of Congress who are concerned with issues affecting elderly women, many of whom live at incomes below the poverty level. As members of Congress we are also concerned about the role of Congress and the Court in maintaining the constitutional balance of federal and state power.

In particular, we have come to understand, both from letters from constitutents and in the course of studying recent proposed legislation, that two recent sociological phenomena -- the burgeoning divorce rate, 1/ and the increasing economic importance of pensions and other retirement plans 2/ -- have combined to create a substantial problem in assuring adequate support in their later years for women who have assumed the traditional primary role of mother and homemaker. Such women are increasingly faced with divorce after years of difficult but unremunerated work in the home; 3/ having been out of the job market for many years,

---

1/ "[T]he recent wave of divorce reforms which made no-fault divorce the rule in all but three states [made] ... divorce readily obtainable upon unilateral demand." 124 Congressional Record No.3, H-79 (Jan. 23, 1978), remarks of Rep. Schroeder. Rep. Schroeder also stated that the national divorce rate peaked at "1 million annually in 1974." (id.)

such women are often without the skills to support themselves. Further, even if they do seek to work, these women are often discriminated against by employers on the basis of both age and sex. And, those who do manage to obtain work may have too few working years remaining to build up an adequate pension on their own behalf.

To a great extent, the federal government, rather than alleviating this situation, has aggravated it. For, many families expect to derive income during retirement from pensions and other benefits either

2/ "Over the past decades, pension benefits have become an increasingly significant part of the consideration earned by the employee for his services. As the date of vesting and retirement approaches, the value of the pension right grows until it often represents the most important asset of the marital community .... A division of property which awards one spouse the entire value of this asset, without any offsetting award to the other spouse, does not represent the equal division of community property contemplated by Civil Code section 4800." In re Marriage of Brown, 15 Cal. 3d 838 (1976).

3/ "We are a society which places value on home and family, encouraging women to stay home to take care of children. Yet one of the most severe forms of economic discrimination is that we fail to attach an economic value to this service." 124 Congressional Record No. 3, H-80 (Jan. 23, 1978), remarks of Rep. Schroeder.

based on federal employment (such as civil service employment, or military service), or provided through federal taxation (social security, and railroad retirement benefits, for example). With the exception of social security, 4/ none of these programs provide any benefits specifically earmarked for former wives.

Several bills have been introduced in recent Congresses to deal with these problems, and many days of hearings have been held. (See, e.g., Pension Problems of Older Women, Hearings before the Subcommittee on Retirement Income and Employment of the Select Committee on Aging, House of Representatives, 94th Congress, 1st Sess. (1975); Annuity Provisions for Former Spouses, Hearings before the Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service, on H.R. 3951, House of Representatives, 95th Congress, 1st Sess. (1977).) Among the proposals introduced in the present session of Congress have been federal legislation mandating pro-rata division of civil service retirement benefits upon divorce after

---

4/ The OASDI program has provided some benefits for certain divorced wives and widows for some years; the former 20-year marriage requirement for such benefits was lowered as of 1979 to a 10-year requirement. See 42 U.S.C. §§ 402 (b), (e), and (g), 416 (d), (e); Pub. L. 95-216, Title III, § 317 (a), (c), 91 Stat. 1548 (Dec. 20, 1977).

twenty years of marriage (introduced by Rep. Schroeder) (H.R. 3951); similar legislation providing for pro-rata division of military retired pay and death benefits (H.R. 11354, also introduced by Rep. Schroeder); and a bill which would divide civil service pensions upon divorce after five years of marriage, but only if the state divorce courts failed to consider such pensions as marital property (H.R. 9412, introduced by Rep. Leach).

Strong objections, however, were raised to this type of approach. Principally, these objections, voiced particularly by the U.S. Civil Service Commission, were based on the fact that "[S]tate laws and state courts have always controlled in matters of domestic and property rights." (Letter of Alan K. Campbell, Chairman, U.S. Civil Service Commission, printed in H.R. Rep. No. 95-713, 95th Cong., 1st Sess [1977], at 7). While the Commission realized that some federal rules in this area may be appropriate, it believed that extensive consideration was necessary before such federal intrusion into traditional state areas could be undertaken (id.).

Upon investigation of these objections, the Committee on Post Office and Civil Service of the House of Representatives determined that many states, including both community property states and common law states which recognize equitable division of marital property, 5/ recognize the rights in retirement benefits earned during marriage as divisible upon divorce. Yet, the federal government's involvement in

retirement benefits was proving an impediment even to these state law developments, for federal administrative agencies did not recognize state divorce decrees splitting retirement benefits when those decrees required federal cooperation.

Consequently, this Congress was unwilling to embark without further study upon the momumental task of fashioning a law of property division upon divorce pertaining to federally-derived retirement benefits. Rather, the Committee on Post Office and Civil Service recommended that the federal government should cooperate with the efforts of states, operating within their traditional sphere, to accomodate the realities of present family property accumulations by viewing annuities, including those derived from federal sources, as property divisible upon divorce. H.R. 8771, recommended by the Committee and passed by the House of Representatives by a vote of 369 to 7 6/ addresses this problem as to civil service retirement benefits, by providing that the Civil Service Commission shall pay benefits

---

5/ Prof. Harry Foster presented the following list of "states holding that pension or retirement benefits are community or marital property": Community property states- California, Idaho, Louisiana, New Mexico, Texas, Washington; Equitable distribution states- Missouri, New Jersey, Wisconsin. Hearings, Annuity for Former Spouses, supra, at 49.

to a former spouse if a court order or property settlement upon divorce, annulment, or legal separation so provides. 7/ This bill, unlike the earlier proposal to mandate pro-rata division, was supported by the Civil Service Commission as consistent with the traditional state and federal roles in this area. (H.R. Rep. No. 95-713, supra, at 9; see also id., at 10-11). 8/

In this case petitioner argues in effect that the traditional state responsibility to divide property upon divorce

---

6/ A similar bill has been approved by the Senate Subcommittee on Civil Service and General Services, of the Committee on Governmental Affairs, and is awaiting referral to the full Committee and to the whole Senate.

7/ At page 23 of their brief the United States misquotes Rep. Schroeder's statement concerning the effects of H.R. 8771. They state that Rep. Schroeder stated the bill would "change the fact that 'under the supremacy clause (Article VI, cl. 2) of the Constitution, valid congressional enactments preempt conflicting State community property provisions.'" (Emphasis added).

Rep. Schroeder was merely stating the well established principle that the supremacy clause serves to preempt State community property provisions that conflict with federal law. H.R. 8771 would not change this established legal principle. It does serve

should be considered superceded whenever the federal government provides for retirement income based on employment without

---

7/ continued

to provide a mechanism for enforcement of state court judgments and operates to supercede any federal laws that might indicate a preemption problem existed in this respect.

8/ The bill is also supported by the ABA Family Law Section; "The Family Law Section recommends the adoption of [H.R. 8771] because a civil service annuity may be the most substantial asset produced by the parties during their marriage and, if it is not considered in the distribution of marital property, economic hardship will be visited upon many middle aged and elderly spouses whose marriage is dissolved. It should not be insulated from distributable marital property. It is no answer to assert that an annuity may be considered in setting alimony because of the inherent difficulties in the enforcement and collection of alimony.

Legislation such as H.R. 8771 is urgently needed and if enacted would permit federal cooperation with state law and court orders in this significant area of divorce which affects the lives and economic future of millions of our citizens whose most frequent contact with the administration of justice may be made in such cases." (ABA Section of Family Law, Report to the House of Delegates, to be presented in August, 1978).

creating a special benefit for divorced spouses. The United States by now arguing in support of petitioner apparently has reversed its former position -- that state laws and state courts have been and should remain presumptively controlling in matters of domestic property rights. The United States, instead, now supports the creation of a federal common law of property division upon divorce. Petitioner's theory, if accepted by this court, would create as federal law a rule detrimental to the displaced homemakers described above. Further, were the theory propounded by petitioner adopted, the implications for federal legislators would be enormous: as to every piece of legislation which could affect family property matters, Congress would be compelled to consider whether the legislation ought to displace state law, and if not, to so provide explicitly, rather than, as in the past, assuming the application of state law and creating uniform, explicit federal rules only where necessary to the federal scheme.

Thus, our concern in filing this brief is both with the particular problems of elderly divorced women and with the proper federal and state role in matters pertaining to family property. While it may well be that the situation is one which calls for a federal legislative solution, at least as to federally-derived benefits, we do not believe that the state rules should be displaced unless and until careful and comprehensive consideration is given to the effects of such displacement, and to the appropriate uniform rules to be enacted.

Since there is no evidence that former Congresses ever considered these matters in enacting the statutes creating the various kinds of federal retirement benefits, preemption by way of imputed intent would be entirely inconsistent with the basic division of responsibilities between the state and federal governments. It is to elaborate upon this view that we file this brief.

SUMMARY OF ARGUMENT

I. There are two tests by which to evaluate whether a federal statute preempts a state law: (1) In the instance of an "actual conflict" between the two legislative schemes or (2) In the instance of an "unambiguous Congressional mandate" to preempt. Absent either of these circumstances a weighty presumption favors the validity of the state law, particularly in an area such as domestic relations, which has historically remained in the domain of the States.

II. The Railroad Retirement Act does not preempt California community property law regulating the division of community benefits upon dissolution of marriage. There is no indication of a "Congressional mandate" to preempt California law evidenced in the character of the Railroad Retirement Act, the designation of the employee as "beneficiary" of the plan, the provisions of the plan regarding spouses, nor the anti-assignment provision of the Act. There is no "actual conflict" between the two legislative schemes manifested by any of these factors either.

A. The character of the Railroad Retirement Act suggests that the Act most resembles a private pension plan. The Act's content resulted from railroad industry bargaining negotiations between management and labor. There is no indication that Congress intended the Act to be treated differently than private pension plans in terms of local property laws.

B. The designation of an employee as beneficiary under the Railroad Retirement Act illustrates no intent to preempt state law nor any federal-state conflict. State community property laws operate in many ways, including instances of death or on-going marriage, upon federally-derived benefits. The mere creation of a federal property right does not warrant the creation of a federal law for division of property: federal salaries are not exempt from state property laws merely because they are federal in origin.

Furthermore, all financial obligations of a beneficiary are not terminated merely because he received federally-derived benefits, so receipt of the annuity amount in full is not assured. Pension benefits could be divided upon divorce without decreasing benefits received by the employee-spouse; and on the other hand, other obligations of the employee-recipient may affect the annuity amount available to him on a monthly basis.

C. The provisions regarding spouses provide no illumination of Congressional intent nor do they reveal any 'actual conflict' with state law. The legislative history

shows that benefits for divorced wives were omitted in order to minimize costs for the Retirement system, not to ensure that divorced wives be cut-off from benefits.

D. The anti-assignment provision of the Railroad Retirement Act cannot be read as preempting California law by Congressional mandate or by implication. Community property division of benefits is neither an "assignment" nor an "anticipation" of benefits, as prohibited by the act.

III. Past authority of this Court, in which federal laws were found to preempt state community property laws, are distinguishable from the present case. Past cases involved state rules for disposition of community property upon the death of one spouse which conflicted with specific federal statutes regulating the disposition upon death of that specific property. No specific federal law, as part of the Railroad Retirement Act or otherwise, specifies a method for distribution of community property upon divorce.

Since neither test for federal preemption of state law is met by the facts of this case, the judgment below should be affirmed.

ARGUMENT

I

A FEDERAL STATUTE PREEMPTS STATE LAW ONLY IN THE INSTANCE OF "ACTUAL CONFLICT" BETWEEN THE TWO LEGISLATIVE SCHEMES OR AN "UNAMBIGUOUS CONGRESSIONAL MANDATE" TO PREEMPT

The principle which governs evaluation of whether state law is preempted by federal statute has recently been restated by this Court.

> Where ... the field which Congress is said to have preempted has been traditionally occupied by the States . . . 'we start with the assumption that the historic ... powers of the states were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress.' Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, (1947). This assumption provides assurance that 'the federal-state balance' United States v. Bass, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts.
> Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

Thus, state legislation as to certain matters is to be presumed valid in the absence of either "such actual conflict between the two schemes of regulation that both cannot stand in the area" or "an unambiguous congressional mandate" to preempt state law. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141, 146 (1963).

Primary among those areas as to which this weighty presumption against federal preemption applies are laws dealing with domestic relations generally, and family property matters particularly. For, from the formation of the nation, "[t]he whole subject of domestic relations, of husband and wife, parent and child [has] belonged to the laws of the States and not to the laws of the United States." (In re Burrus, 136 U.S. 586, 593 (1890)). As a consequence, "there is no federal law of domestic relations, which is primarily a matter of state concern." (De Sylva v. Ballentine, 351 U.S. 570, 580 (1956)). And, since state laws in this area typically involve "an ingenious, complex, and highly purposeful distribution of ... rights between husband and wife" (United States v. Yazell, 382 U.S. 341, 351 (1966)), application of federal law, as to a particular matter, even for the protection of federal interests, is likely to cause consequences to the parties through the interaction with complicated state rules which federal courts are unlikely to foresee. Consequently,

> "[b]oth theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements [which] should be overriden only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." (Yazell, supra, 382 U.S., at 352 (emphasis added)).

Thus, from these cases two possible tests emerge to measure whether the Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. §231 ff. mandates the preemption of California community property laws as applied by the California Supreme Court:

(1) Is there an "unambiguous congressional mandate" that directs that the Railroad Retirement Act preempt California community property law? or

(2) Is there an "actual conflict" between the California community property scheme and the Federal Railroad Retirement Act so that both cannot stand in the area of division of benefits upon dissolution of marriage?

The answer to both these questions is no.

II

THE RAILROAD RETIREMENT ACT DOES NOT PREEMPT CALIFORNIA COMMUNITY PROPERTY LAW REGULATING THE DIVISION OF COMMUNITY BENEFITS UPON DISSOLUTION OF MARRIAGE.

The Railroad Retirement Act, unlike other federal statutes 9/ is entirely lacking in the necessary clear and explicit indication of intent to create a federal rule governing family property rights. The various indices of intent relied upon by petitioner, and by the United States, indeed, suggest only that Congress never expressly considered whether, and to what degree, state family property laws should apply with respect to Railroad Retirement benefits. Nor would application of state laws dividing the right to pension benefits upon divorce fundamentally undermine the Congressional scheme. No conflict exists between the Railroad Retirement Act and California community property law.

A

The character of the Railroad Retirement Act suggests that it most resembles a private pension plan and that Congress did not intend the Act to be treated any differently than a private plan in terms of local property laws.

9/ See part III, at page 45.

We agree with the United States that petitioner's argument concerning whether or not benefits under the federal railroad retirement system are property at all is not pertinent. 10/ California has determined that the Railroad Retirement benefits are to be treated as community property upon divorce, and the question of what kinds of contingent rights may be so treated is a state, not a federal, question.

It does seem significant to evaluation of the preemption argument, however, that the presentation of the history and character of the Railroad Retirement System by the United States is somewhat skewed. For, that system, "the only federally administered pension plan for workers of a single private industry" (Report of the Commission on Railroad Retirement, The Railroad Retirement System: Its Coming Crisis (hereinafter "Commission Report") (1972), at 56), "is today, in essence, a company pension program administered, for historical reasons, by the federal government." (S. Rep. No. 93-1163, 93rd Cong., 2d Sess., reprinted in U.S. Code Congressional and

---

10/ We do note, however, that whether or not benefits payable under the Act are contractual, or are vested, is not the relevant question. A legitimate expectancy may be a property right although neither contractual nor vested. See, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972); Mathews v. Eldridge, 424 U.S. 319 (1976).

Administrative News p. 5702 (1974), at 5714). 11/

11/ The "historical reasons" were explained in the Commission Report as follows:

> Since the 1850's Congress, with land grants and Federal charters, had treated the railroads much as a single transportation system and railway employees as quasi-public servants - two assumptions underlying the single-industry approach to the railroad retirement plan and the willingness to take Federal action. Railroad labor had generally enjoyed a friendly relationship with Congress. Relations were especially warm after the passage of the Interstate Commerce Act of 1887 and the Railway Labor Act in 1888. Much railway labor legislation - for example, the establishment of a standard, eight--hour work day in 1916 for the operating group employees-- was justified through the interstate commerce clause of the Constitution. Advocates of a Federally-regulated railroad pension system therefore reasoned that Congress would be sympathetic if shown that the retirement of older workers would result in increased safety and efficiency in interstate commerce.

(Commission Report at 55).

The new 1974 Act, as well as the 1937 amendments which ended the constitutional litigation concerning the program, 12/ and many of the subsequent amendments, were first negotiated between labor and management, and then enacted into law substantially as negotiated. 13/ Contributions into the

---

12/ The first Railroad Retirement Act, passed in 1934, before the Social Security Act, was declared unconstitutional in Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935). The 1935 Act was also enjoined as unconstitutional by a district court (Alton Railroad Co. v. Railroad Retirement Board, 16 F. Supp. 955 (1936)), but that litigation was dropped after labor-management negotiations resulted in a memorandum of agreement, the principles of which became the Railroad Retirement Act of 1937. See Commission Report, at 57-58. See also, as to other amendments negotiated by labor and management, id., at 68.

13/ After the Commission on Railroad Retirement, established by Congress in 1970 to study the actuarial soundness of the system and make recommendations for its long term development (Pub.L. 91-377, 84 Stat. 791), made its report, Congress, in Pub. L. 92-460, 86 Stat. 765 (1972), instructed railroad labor and management to enter into negotiations and to submit a report containing their mutual recommendations upon restructuring the retirement system. Those recommendations were the basis for

Railroad Retirement Fund are made through taxes on both the employer and the employee, but the employee pays only the same tax rate as is paid by employees covered by social security, while employers are taxed not at the same rate as in social security but at a much higher rate. S. Rep. No. 93-1163, supra, U.S. Code (1974), at 5716-17. And, the Railroad Retirement Account, unlike other trust funds administered by the federal government, is

> treated similarly to trust funds established for the payment of other private pension plans, with investments being made solely on the basis of the best return on investments, and other considerations such as the efficient management of the public debt not being taken into account ..."
> S. Rep. No. 93-1163, supra, U.S. Code (1974), at 5714.

Moreover, benefits in the 1935 Act were, like private pension benefits, based solely upon salary and length of service. (Commission Report, at 58).

13/ continued

the 1974 Act. See Women and Railroad Retirement, Hearings Before the House Subcommittee on Retirement Income and Employment, Select Committee on Aging (94 Cong., 1st sess.) (1975), at 20.

While, in the years between 1935 and 1974, the plan began "to embrace provisions of the social security system (basically social insurance) [although it was] essentially an employee retirement plan" (id., at 73), the 1974 revisions were designed to separate the social insurance aspects from the employee retirement plan aspects, and to return to the original concept of a pension plan. (S. Rep., supra, U.S. Code (1974) at 5714.

Finally, despite the contention of petitioner, and of the United States, that there is no "vesting" notion in the plan, the 1974 revisions contain extensive transition provisions designed to assure that no employee loses rights which have already matured; it is plain from the language of the committee reports that Congress believed that it would be inconsistent with the premises of the system retroactively to revise benefits downward. S. Rep., supra, U.S. Code (1974), at 5716.

Thus, the railroad retirement system, at this point, is best viewed as analogous to private pension plans, rather than as a specialized social security system. 14/ Under California law, and the law of many other states, had Ms. Hisquierdo's husband worked for any private company rather than a railroad, any pension benefits earned would have been divisible upon divorce. And, while there have been recent refinements in this rule, the basic concept that pension benefits are divisible upon divorce long antedates the 1974 completely revised

Railroad Retirement Act. (See, e.g., Crossan v. Crossan, 35 Cal.App. 2d 39 (1939) Estate of Perryman, 133 Cal. App. 2d 1 (1955)). The proper approach to the pre-emption question, therefore, ought to be whether there is any indication that Congress intended to displace state laws applicable to division of rights in private pension plans upon divorce, with the result that

---

14/ The United States makes much in its brief (at 2-5) of similarities between the Social Security system and the Railroad Retirement Act. These analogs are overshadowed by the legislative history which demonstrates the Railroad Retirement Act is more analogous to a private pension plan. However, it is interesting to note that even the Social Security Act relies on state law authority in the area of family law.

For determining definitions of family law terms such as widow, widower, child and parent, the Railroad Retirement Act does cite to 42 U.S.C.§416(h) of the Social Security Act. However, the relevant social security act section refers to state law for a determination of marital status and other family law related definitions. Thus, even the social security act, like private pension systems, relies on state law authority in the area of family law.

railroad retirement benefits, otherwise analogous to private pension plans, be treated differently than private pensions. The provisions of the Act reveal no such intent.

B.

The designation of an employee as beneficiary under the Railroad Retirement Act illustrates no intent to preempt state law nor any federal-state conflict.

The United States relies upon the fact that Congress designated the employee as the recipient of the annuity and set benefit levels designed to assure security to that employee as evidencing intent to preempt state law. If that benefit level were reduced through a community property settlement, it is suggested, the intention to provide the employee himself with adequate support would be thwarted. (United States Br., at 13-14).

First, the notion that "[w]hen federal law designates a single beneficial owner. . state law cannot say that there were "really" two beneficial owners all along" (id., at 21) proves entirely too much. For, despite this broad, general statement no contention is made, we take it, that California community property law may not operate in any manner whatsoever upon railroad retirement benefits. For example, if the railroad employee remained married to his or her spouse after retirement, until the death of one or the other spouse,

all benefits received pursuant to the federal scheme by the employee and by the spouse would be, under California law, community property to the extent derived from labor during the marriage. (See Witkin, Summary of California Law, 8th Ed. Vol. 7 at 5113 and cases cited therein.) As a result, one-half of any traceable assets[15] derived from such benefits would be automatically the property at death of the surviving spouse, regardless of any purported testamentary disposition to the contrary.[16] We do not

---

15/ California presumes all assets acquired during marriage to be traceable to community property, so that clear proof of a source in separate property is necessary to avoid inclusion in the community estate. (See Witkin, supra, at 5096 and California Civil Code sections cited therein.)

16/ Under California law, however, any future annuity payments, after the death of the employee or the spouse, would not be community property, and therefore no portion of such payment could be disposed of in the estate of the predeceasing spouse. Waite v. Waite, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972).

understand petitioner, or the United States, to be suggesting that federal law forbids this result, and requires instead that the benefits paid remain for all purposes the separate property of the employee or the spouse to whom the benefits are addressed originally.17/

17/ The Railroad Retirement Act does provide for certain lump sum payments to designated relatives of the covered employee upon that employee's death. See § 6 of the Railroad Retirement Act of 1974, 42 U.S.C. §231 e. Under California law, however, such lump sum payments would not be community property since the community property of a spouse in employment-related benefits terminates with the death of either spouse. See, e.g., In re Marriage of Peterson, 41 Cal. App. 3d 642 115 Cal. Rptr. 184 (1974); In re Marriage of Bruegl, 47 Cal. App. 3d 201, 120 Cal. Rptr. 597 (Cal. Ct. of App. 1975); In re Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, cert. denied 419 U.S. 825 (1974). Thus, there is no possible preemption problem with respect to the devolution of such lump sum payments. See Fithian, supra, 10 Cal. 3d at 600, 517 P.2d at 453-454, 111 Cal. Rptr. at 373-374.

Indeed, any such suggestion, if made, would be quite extraordinary. Whatever else the federal statute may do, it does not purport explicitly to erect a federal rule concerning devolution of the benefits once paid to the appropriate designated recipient. And, given the extreme complexity of the estate laws of the various states, and the great differences among them, creating federal common law rules regarding disposition upon death of federal source property, and superimposing such rules upon the various state laws, would be an impossible task which Congress could not possibly have intended.

Moreover, the granting of property to an individual by the federal government does not in itself create a federal law of property to govern the incidents of ownership or the devolution of the property once received. For example, when the United States grants real property:

> Once patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts. (Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 676 (1974).)

Thus,

> The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the state in their grants; but whatever incidents or rights attach to the

> ownership or property. . . will be determined by the states. . . (Packer v. Bird, 137 U.S. 661, 669 (1891).)

Similarly, railroad retirement benefits once received are currently treated in California as community property for certain federal income taxation purposes.18/ (See Internal Revenue Service, Pub. 555, Community Property and the Federal Income Tax (1978), at 3.) This treatment is premised upon the general rule that conclusive state rules of property division generally, and of community property particularly,

---

18/ Railroad retirement annuities, like Social Security benefits, are generally not themselves taxable. 45 U.S.C. § 231m. Certain other retirement annuities to federal employees, such as civil service retirement benefits and military retired pay, are fully taxable as income by the federal government. For federal taxation purposes that proportion of such benefits traceable to earnings while domiciled in a community property state are divisible as community income for tax reporting purposes. (IRS, Pub. 555, supra, at 2-3.)

govern attribution of income under federal tax laws except as specifically otherwise provided. (Poe v. Seaborn, 282 U.S. 101 (1930); see Fernandez v. Wiener, 326 U.S. 340 (1945).) We do not understand petitioner, or the United States, to be suggesting that railroad retirement benefits remain, by virtue of their source, the separate property once received of the person designated to receive them; any such contention would be inconsistent with the tax treatment of the benefits.

Second, the argument would lead to the conclusion that salaries paid by the United States to its employees are similarly exempt from state laws concerning division of property upon divorce. For, those salaries are also by statute payable to the employee. See, for example, 28 U.S.C. § 5 setting the salary of Justices of the Supreme Court of the United States:

> The Chief Justice and each associate justice shall each receive a salary at annual rates determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.

Federal salary levels are set without taking into account any community property consequences. Yet, while future salaries are not, of course, divisible upon divorce, savings from past salaries, and assets purchased with such salaries, are of course subject to state community property law regardless of their federal source, and are

treated in this way for federal income tax purposes when separate returns are filed. (IRS Pub. 555, supra.)19/

Third, in designating the annuity for the employee and setting the benefit schedule, Congress did not purport to eradicate all obligations which the covered employee might incur, whether before or after receiving the benefits, which could diminish the amount actually available for living expenses for himself. Nor were state laws which could affect the nature of such obligations displaced, so that the amount of money available for living expenses may well vary according to state law. For example, if a covered employee who entered into an unsecured loan before receipt of benefits began to meet pre-retirement expenses, with payments to continue into the retirement period, he might be constrained to repay that loan in part out of his annuity once received, and state law could affect that obligation -- through usury provisions,

---

19/ In a footnote, the court in Wissner, infra, said that it was not deciding "whether California is entitled to call army pay community property." (338 U.S., at 657 n.2). The proposition, however, has not to our knowledge since been questioned, and the alternative -- a federal rule for property division upon divorce or death for all federally-derived property -- seems out of the question.

for instance, or simply through rules governing contractual interpretation. 20/

Indeed, it is conceded that benefits may be reduced directly due to state law concerning family obligations upon divorce. (United States, Br. at 16,22.) And, state laws vary greatly as to the principles governing the award of child support and alimony; several states, for example, do not award alimony at all under any circumstances, relying instead upon property divisions to accord economic equity between the former spouses. (See for example the Texas case cited in the Appendix to the Brief of United States as Amicus Curiae.)

Moreover, the United States also regonizes that

> [i]n setting the level of alimony payments, state courts may consider the amount of railroad benefits to be received [and] may also encourage the parties voluntarily to take such payments into account in reaching reasonable property settlements.
> (United States Br., at 22.)

As the United States notes, such awards or settlements could have the same effect as community property divisions -- that is, the economic security of the employee "would be severely threatened."
(United States Br., at 14-15).

20/ See pgs. 36-45, infra. for a discussion of the pertinence of the anti-assignment section to this hypothetical.

The United States attempts to reconcile its recognition that Congress did not intend to insulate railroad retirement benefits from all legal obligations generally, and from monetary obligations incurred on account of a former marriage in particular, with its position in this case by supposing that Congress was willing to sanction a diminution of benefits due to the needs of dependents, but not the dividing of retirement payments "without regard to the needs of the divorced spouse or the effect on the retired worker." (United States Br., at 22).21/ Aside from the argument based upon §§ 459 (42 U.S.C.§659) and 622 (42 U.S.C.§401 ff.) of the Socal Security Act, which are discussed below, however, the United States is unable to explain how it is able to derive this intent from a statute which says nothing whatever about the treatment of employees' railroad annuities upon divorce. To import that "need" rationale is indeed to create, without legislative sanction, a federal rule of family law.

21/ It is not clear whether the position of the United States would foreclose those non-community property states which practice "equitable division" with respect to pension rights from continuing to do so with regard to railroad retirement benefits. These states do not "divide the retirement payments in half as a matter of course" (United States Br., at 22), but they view the division as a matter of marital property law, and may therefore not take into account need. It would appear that the United States must

Fourth, the United States fails to note that California courts have created ways of taking pensions into account in divorce property settlements which would not involve diminution of the payments when due, either directly or by way of an order to pay over a portion of the benefits to the former spouse if and when received. One discretionary remedy available to California courts is the valuation of the pension right at the time of the divorce, using actuarial principles, and an adjustment of the division of other property to account for this value. (See In re Marriage of Brown, 15 Cal. 3d 838 (1976) and cases discussed therein.) Such an approach would not, as would alimony and child support awards, result in the beneficiary having less money available for daily sustenence once retired than Congress intended.

Finally, the amount available to the employee himself for his living expenses after retirement may be affected by many other state laws concerning family obligations which Congress could not possibly have intended to displace. For example, the railroad retirement system does not provide benefits based on the number of minor children whom the employee has an obligation to support under state laws; and, state laws vary as to the age at

21/continued:
intend to encompass such divisions as well in its argument; otherwise, its argument would amount to nothing more than the contention that Congress intended to ensconce common law, rather than community property, principles of marital property into federal law.

which this support obligation is extinguished. Similarly, state laws vary as to the obligation to support aged parents.

Thus, the fact that Congress designated the annuity as payable to the employee and hoped in setting benefit levels, to provide adequate support for the individual cannot in itself be said to displace all state laws which might have the effect of making another person entitled to a portion of the benefits once paid, or which permit the prospect of the benefits to be taken into account in establishing obligations.

C

The privisions regarding spouses provide no illumination of Congressional intent nor do they reveal any "actual conflict" with state law.

The fact that Congress provided that spousal benefits are to terminate upon divorce cannot supply the requisite intent to preempt state law either. The spousal benefit is an additional amount, over and above the amount due to the employee. As such, it constitutes an additional burden upon the system as a whole, necessitating either lower overall benefits or higher tax rates to finance than would be the case if no such benefit were available. The decision to terminate this benefit upon divorce can thus be viewed as a decision that, given the wide variation in state laws as to support obligations and property settlements upon divorce, it would be unwise to in effect create a federal obligation of

support, in a set amount, by burdening the entire system with an additional benefit for divorced spouses. That is, were such an annuity available on top of the regular employee's annuity, all employees under the system would be financing a family property right after divorce which might be inconsistent with the rule applicable to private pension plans in their state.

The legislative history of the 1974 Act supports this contention by showing that the reason for rejecting suggested benefits for divorced wives was not the belief that such wives ought not to receive any portion of the employee's annuity, but rather an unwillingness to create an additional benefit, with the attendant financial consequences for the plan as a whole:

> This matter [of a benefit for divorced wives similar to that provided under the Social Security Act] was gone over very thoroughly by the Joint Negotiating Committee22/ . . . [T]he conclusion that the Joint Negotiators reached was that at the present time, given the financial situation of the fund, the benefit liberalization provided in this bill was the full extent to which Congress ought to go. . . A line has to be drawn

22/ As explained supra, at page 19, the bill which became the 1974 Act resulted from agreements reached by a negotiating committee composed of labor and management.

> someplace, and the bill indicates the lines that the Joint Negotiators thought ought to be drawn at this time. (Statement of Mr. William Dempsey, member of the Joint Negotiating Committee, at the hearings on the bill, in response to an inquiry by Chairman Staggers of the House Interstate and Foreign Commerce Committee, reproduced in Women and Railroad Retirement, supra, at 5.23/

Thus, the determination to terminate spousal benefits upon support does not, as is argued, constitute an unequivocal intention to displace state laws concerning the rights of divorced spouses; it simply reflects an intention not to create a federal right because of the financial consequences of doing so, rather than because of an intent to cut-off divorced spouses.

23/ Because the bill was formulated, pursuant to Congressional direction, by the Joint Negotiating Committee, this intent of private individuals is entitled to more than its usual weight, and it must be assumed that Congress adopted as its own the intent stated. The legislative history relied on by the United States (Br. 16-17) is not to the contrary. First, it involves residual death benefits, not periodic support payments, or payments pursuant to divorce. Under California law, death benefits would not be part of the community estate upon divorce. See n. 17, supra. Second, it pertains to the prior Act, not to the entirely revised 1974 Act. Third, it involves a choice between various potential beneficiaries; here, the present spouse, if there were one, would remain entitled to the spousal annuity, so that no choice among beneficiaries need be made.

D

The anti-assignment provision of the Railroad Retirement Act cannot be read as pre-empting California law by Congressional mandate or by implication.

The United States finally relies for the requisite intent to preempt state law upon the fact that the annuity is not "assignable or ... subject to garnishment, attachment, or other legal process ... nor shall the payment thereof be anticipated." (45 U.S.C. § 231 m). Reliance is also placed upon the fact that an exception to this provision for child support and alimony has recently been amended to make clear that the exception does not pertain to community property divisions. 42 U.S.C. § 659.

The relevance of the exception created by 42 U.S.C. § 659 can be dealt with very briefly. For, the 1977 amendment making clear that property settlement orders are not within the garnishment provision, merely puts matters with respect to such settlement orders back to where they were before Congress created the alimony and child support exceptions to the garnishment rule to begin with, in 1974. 24/ That is, the 1977 amendment subjects property division orders to the same rules which were

---

24/ The language of § 231 m is precisely the same as that contained in the prior Act. (See legislative history following 45 U.S.C.A. § 231 m)

applicable before 1974 to all other obligations of the retiree or potential retiree, including obligations to pay alimony and child support. 25/

25/ Thus, the 1974 exception, and the 1977 clarifying amendment thereto, cannot supply the "need" rationale propounded by the United States (see pgs. 31 - 33, supra). For, those provisions, particularly given their origin in concern for keeping dependents off the welfare rolls (see United States Br., at 18-19), may well evidence an intent that federal benefits and salaries may be garnished -- that is, diverted from the designated recipient to dependents without ever being paid to that recipient by the United States -- only where there is a strong federal interest -- limiting the number of dependents forced to seek welfare -- and not otherwise. The fact that the exception is not limited to those on the welfare rolls is, of course, not inconsistent with this motive. Spouses and children not presently on the welfare rolls could easily be forced on to those rolls in the future if their support payments proved uncollectable. But the need distinction cannot be carried over to the substantive question of whether community property rights, although not collectable by garnishment on the federal government, nonetheless remain obligations enforceable by other means.

The case reproduced as an Appendix to the United States brief is therefore also entirely beside the point, since it

The only question, then, is whether community property division of federally administered retirement benefits upon divorce constitutes an impermissible "assignment" or "anticipation" of such benefits under § 231 m. 26/

First, neither of the terms suggested by the United States as here applicable have, in ordinary legal parlance, the meaning attributed to them. Plainly, the California law can operate without "assigning" any interest to the divorced spouse. An "assignment" of a right ordinarily connotes the complete substitution of a third party for the individual to whom the right was originally due. (See e.g., E. Griswold, Spendthrift Trusts, at 455-456.) In this context, therefore, the prohibition against assignment means simply that the recipient or potential recipient of an annuity may not, for consideration or otherwise, convey to another the right to receive from the government the periodic benefits or any portion thereof. As such, the "assignment" interdiction is merely the counterpart of the garnishment and attachment provisions,

---

25/ continued

determined only that a Texas order for division of community property may not be enforced by means of garnishment on the United States.

except that it prevents the conveyance of the right to receive benefits directly from the fund as well as any transfer by operation of law.

For example, California law permits a court to order a parent

> to assign to the county clerk, ... or other officer of the court ... that portion of salary or wages ... as will be sufficient to pay the amount ordered for the support ... of the minor child. Such order shall operate as an assignment and shall be binding upon any existing or future employer of the defaulting parent upon whom a copy of such order is served ...."
> Cal. Civ. Code § 4701.

The provision is applicable to pension funds and retirement benefits. A state law which purported similarly to provide with respect to community property divisions 27/ would, obviously, be preempted by § 231 m; no such assignment could be ordered (or made voluntarily), and the Railroad Retirement Board could refuse to honor any purported assignment and continue to pay the benefits directly to the employee-beneficiary such as Mr. Hisquierdo. 28/

26/ The United States apparently concedes that only those two terms are arguably relevant. (United States Br., at 18-19).

But, Ms. Hisquierdo is not here claiming any right to be paid a portion of Mr. Hisquierdo's benefits when due by the Railroad Retirement Board; she apparently concedes the impermissibility of such a remedy. Thus, the prohibition upon "assignment" has no applicability here.

The same may be said of the "anticipation" clause. While we have found no direct explanation of the "anticipation" language in the legislative history, it is

---

27/ Cal. Civ. Code §§ 4351, 4363, 4363.1, 4363.2, and 4363.3, Cal. Stats. 1977, ch. 860 § 4, do permit joinder of employee pension benefit plans in divorce proceedings, and allow orders directing payment of a portion of benefits when due by the plan to the former spouse. However, a pension plan may decline to be joined once served (§ 4363.1 (b)), and, if it does so, no enforceable order may be entered requiring it to divide the pension (§ 4351).

Thus, Ms. Hisquierdo would have no right under California law to direct payment by the Railroad Retirement Board were this a completely private pension, and there is therefore no preemption problem in this respect.

28/ H.R. 8771, supra, if it becomes law, would permit similar treatment of civil service retirement benefits, for property orders upon divorce and to that degree would overrule the anti-assignment provisions of the civil service retirement statute.

almost certainly a term of art derived from language used in spendthrift trusts, and in state statutes concerning the alienability of retirement and disability benefits. (See E. Griswold, Spendthrift Trusts (1947), at 119, 542.) In this context, a restraint upon "anticipation" is "a direction that the interest of a sole beneficiary shall not be paid to him before a certain date." (Id., at 583). Read in this light, the "anticipation" provision of § 231 m is simply a prohibition upon attempts by the retiree or potential retiree to require payment of periodic benefits not yet due, or to compel a lump sum payment inconsistent with those provided by statute. As such, the provision has nothing to do with this case.

Not only is there no support in the language of § 231 m for the preemptive intent claimed, but any reading of the language such as that suggested by the United States would be truly extraordinary. Such a reading, for example, would suggest that a contract entered into before retirement by a railroad retiree could not be enforced by an order to pay, if any part of the funds available for payment might be derived from retirement benefits. It would also suggest that, in determining the capacity of a potential railroad retiree to repay a loan, the loaner could not take into account the prospect of retirement benefits. Plainly, Congress did not intend to absolve railroad retirees of all legal obligations once retired, or to preclude them from "anticipating" the benefits in the sense of expecting to receive them. Section 231 m refers only to the means of enforcing obligations, not to their existence.

Similarly in the case before the court Mr. Hisquierdo is entitled to sue Ms. Hisquierdo for dissolution of marriage. Under state law, the community property must be divided equitably. Under state law the railroad retirement benefits are community property and must be considered in valuing the community's worth. Once the division is made, if Mr. Hisquierdo owes Ms. Hisquierdo money she can enforce her judgment against him by any means except attachment or assignment of his railroad pension benefits according to § 231 m. If he has no other assets she may have a right without a remedy. But § 231 m does not eradicate her right, i.e., her community property interest under state law in the pension -- it only affects her ability to enforce her right.29/

29/ The United States implicitly recognizes this construction as valid. For example, they acknowledge that state courts may take prospective railroad retirement annuities into account in setting alimony and child support (Brief at 22) and the U.S. does not suppose that, before the 1974 garnishment exception, alimony and child support orders to be paid from retirement benefits were simply void (Brief at 22). And, the U.S. recognizes that "the parties voluntarily [may] take such payments into consideration in reaching reasonable property settlements" even though no garnishment would be available, because of §231m (Brief at 22). But these concessions demonstrate the internal inconsistency in the United States' argument for, if a court order that Mr. Hisquierdo immediately pay Ms. Hisquierdo the actuarial equivalent of her share of the benefits is (continued on next page)

The United States suggests that this Court in Wissner v. Wissner, 338 U.S. 655 (1950) has foreclosed any direct confrontation with the language of § 231 m, by construing "a federal statute almost identical to section 231 m" as in flat conflict "with a state judgment declaring insurance proceeds to be the community property of the decedent and his widow." (United States Br., at 21). But both halves of this contention are incorrect. The Wissner statute was not "almost identical"; it differed substantially and materially. And, in any event, the court reached the conclusion that the property division was preempted independently of the anti-attachment provision.

The anti-attachment statute in Wissner provided that

> Payments to the named beneficiary shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal

29/ continued

"anticipation" as the United States asserts, so is taking pension benefits into account in a voluntary settlement, which they acknowledge is acceptable. And similarly if an order that Mr. Hisquierdo pay a portion of benefits once received to Ms. Hisquierdo would be an "assignment", so would a pre-1974 order to pay alimony.

> or equitable process whatever, either before or after receipt by the beneficiary...." (Wissner, supra, at 659).

Thus, it did provide, unlike § 231 m, that the proceeds "shall be exempt from the claims of creditors." Such a provision makes sense, of course, in the context of a life insurance policy; the intent is that a third party not be required to pay off the debts of the insured, through any means. But it would not make sense as to a living person, and was not included in § 231 m.

Also, the provision in Wissner explicitly prohibited "seizure ... before or after receipt by the beneficiary." Thus, the court was quite right in perceiving a "flat conflict" between that language and an order that the beneficiary pay any obligations from the monetary benefits after receipt. Here, there is no such language, and therefore, no prohibition upon a personal order on the railroad worker to pay an obligation after receipt of pension funds.

At any rate, the discussion of the anit-assignment provision in Wissner comes after the conclusion, based on the entirely separate language concerning designation of the beneficiary, that "the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." (id., at 659). Thus, the discussion of the anti-attachment statute was not necessary to the result in Wissner, and was not identified as the source of the

strong intent to displace state laws found therein.

For the above stated reasons, the Railroad Retirement Act cannot preempt California community property law regulating the division of community benefits upon dissolution of marriage. There exists no "actual conflict" between the two bodies of law nor is there any express "Congressional mandate" to preempt.

III

PAST AUTHORITY OF THIS COURT, IN WHICH FEDERAL LAWS WERE FOUND TO PREEMPT STATE COMMUNITY PROPERTY LAWS, ARE DISTINGUISHABLE FROM THE PRESENT CASE.

Wissner v. Wissner, supra, and Free v. Bland, 369 U.S. 663 (1962), the two cases principally relied upon by petitioner and by the United States, are both cases in which, unlike here, the federal and state statutes were "in such actual conflict ... that both cannot stand in the area." (Florida Lime and Avocado Growers, supra, 373 U.S., at 141).

In Wissner, the National Service Life Insurance Act provided:

> [The insured] shall have the right to designate the beneficiary or beneficiaries of the insurance [within a designated class], ... and shall ... at all times have the right to change the beneficiary or beneficiaries . . . . 38 U.S.C. § 802 (g). (338 U.S. at 658).

In Free, U.S. savings bonds were issued by the Secretary of Treasury under regulations which provided:

> [T]he co-owner of a savings bond issued in the 'or' form who survives the otner co-owner 'will be recognized as the sole and absolute owner' of the bond, 31 CFR § 315.61, [footnote ommitted] and that '[n]o judicial determination will be recognized which would ... defeat or impair the rights of survivorship conferred by these regulations'. 31 CFR § 315.20, (369 U.S. at 667).

In the disputes over whether the insurance proceeds or savings bonds were community property, the Court pointed to the federal statute and regulations cited above to find that a specific federal rule had been created to govern property rights between individuals: namely insurance proceeds belonged upon death to the named beneficiary, and co-owned bonds belonged to the surviving co-owner. Since the federal rule applying to the situation was clearly stated in the federal statute or regulation, that rule had precedence over any state rule to the contrary.

As the analysis in Part II shows, nothing in the Railroad Reitrement Act states a rule concerning the division, or non-division, of pension benefits upon divorce.

Were there to be a federal rule, therefore, the courts would have to create one -- which is precisely what the United States invites this Court to do with its "need" distinction, and which is precisely what the precedents cited in Part I, supra, caution against. 30/

Furthermore, the preemption of state community property laws in Wissner and in Free, was found necessary because the laws interfered with legitimate exercise of federal powers to further a national interest. In Wissner, the court noted that a liberal policy toward the serviceman and his named beneficiary was evidenced by the comprehensive statutory plan (338 U.S. at 658), and stressed that the statutory purpose involved "the congressional powers over national defense." (338 U.S. at 661).

Similarly, in Free, the success of the management of the national debt was found to depend "to a significant measure upon the success of the sale of savings

---

30/ Creating a federal rule here to govern division of property upon divorce would involve precisely the untoward consequences of disturbing a complex system of relationships otherwise governed by state law warned against in Yazell, supra. For, as explained earlier, (pgs. 26-28, supra) state community property law would presumably continue to operate upon these same benefits in other respects, with possible untoward circumstances not readily foreseeable.

bonds. The Treasury in an effort to make the bonds attractive to savers and investors, introduced the survivorship provisions as "a convenient method of avoiding complicated probate proceedings." (369 U.S. at 669).

Thus in Wissner a national interest based on federal warpower, and in Free an interest based upon the federal treasury, were furthered by finding preemption pursuant to the Supremacy Clause. No similar national interest pertains to the division of Railroad Retirement benefits upon divorce so as to preclude state community property laws from operating; as Part II, supra, indicates, the existence of a railroad retirement system generally is something of a historical accident, and the purported interest in assuring sustenance to the individual employee, while it was a purpose of Congress, is subject to so many individual circumstances, by no means preempted, that preemption as to this one source of diminution of available funds could not cause "major damage if the state law is applied." (Yazell, supra, 382 U.S. at 352).

Finally, Yiatchos v. Yiatchos, 376 U.S. 307 (1964) may substantially undermine the premises of Free v. Bland and, perhaps, of Wissner as well. 31/

31/ From the actual facts of Wissner, recited at 89 Cal. App. 2d 759, it seems plain that if the "fraud" rule of Yiatchos had been applied in that case, fraud would have been found.

In that case, which followed Free by only two years, the Court applied the dicta in Free that "where circumstances manifest fraud or a breach of trust" (Free, 369 U.S. at 670), the otherwise applicable federal rule might give way. In so doing, the Yiatchos court recognized as federal law the Washington rule that a gift of community property is constructive fraud if made without the consent or ratification of the spouse. And in applying this rule, the Court implicitly recognized that the wife did have a community property ownership interest in the bonds; otherwise, there could be no "fraud" in depriving her of that interest without consent or ratification. Also, unless one recognizes such an ownership interest, the Court's suggestion that if the widow's "half of the community estate may be satisfied from property or money other than the bonds, [the co-owner] is entitled to all of the bonds" (376 U.S. at 311) would be without meaning.

Thus, Yiatchos reads Free as not displacing the state law of community property at all, but as simply displacing in some circumstances state law regarding the manner in which that property passes upon death by one spouse -- directly, rather than by will. Yiatchos supports our contention that federal statutes which could affect state family property rules should be construed, where possible, to displace such rules to the minimum degree.

CONCLUSION

For the reasons stated above, the decision of the California Supreme Court should be affirmed.

Dated, July 25, 1978.

Respectfully submitted,

Judith Lichtman
Women's Legal Defense Fund
1010 Vermont Ave., N.W.
Washington, D.C. 20005

Marsha S. Berzon
177 Post St. Suite 700
San Francisco, CA 94108

Stephanie M. Wildman
University of San Francisco
School of Law
2199 Fulton Street
San Francisco, CA 94117

Attorneys for Amici Curiae